



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2012**

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**ON THE FOLLOWING MEASURE:**

**H.B. NO. 2011, H.D. 1, RELATING TO INVOLUNTARY PSYCHIATRIC  
HOSPITALIZATION.**

**BEFORE THE:**

**HOUSE COMMITTEE ON JUDICIARY**

**DATE:** Tuesday, February 14, 2012

**TIME:** 2:05 p.m.

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Julio C. Herrera, Deputy Attorney General

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Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General appreciates the intent of this bill, but cannot support it as it is currently written. The proposed changes to chapter 334, Hawaii Revised Statutes (HRS), establish additional procedures, and amend existing procedures regarding the involuntary examination and hospitalization of persons that meet criteria for commitment to psychiatric facilities.

Section 1 of the bill creates an informal hearings process whereby psychiatric facilities can seek to extend the proposed five-day emergency treatment period for those persons already receiving emergency treatment. This proceeding can be presided over by a judge or a mental health worker. Mental health worker, however, is not defined, nor are there any discernible qualifications required of these workers. Other due process concerns include: (1) the use of evidence normally excluded by the rules of evidence; (2) the absence of a standard of proof required to make necessary findings; and (3) the extension of the current emergency examination period from two days to five days.

The following recommendations are suggested to address the constitutional concerns raised in this section: (1) there should be a formal hearing conducted before a duly appointed judge within seventy-two hours after the application is filed; (2) all references to a mental health worker should be deleted; (3) the term "emergency treatment" should be used to distinguish between short-term treatment and long-term involuntary treatment; (4) a reliable record of the proceedings should be kept by the court, not the mental health worker; (5) the contents of the

certification for extended involuntary emergency treatment should include findings by the judge only, and filed with the appropriate court; (6) the paragraph dealing with petitions to court for review, should be deleted; (7) the duration of the extended involuntary emergency treatment should be changed from twenty days to four hundred eighty hours for consistency purposes; and (8) the requisite standard of proof for this proceeding should be stated as a preponderance of evidence.

Section 2 of the bill authorizes the emergency examination of a person, with or without a warrant, where the person's conduct shows the need for examination. The Director of Health, upon written application, may issue the warrant authorizing emergency examination at a psychiatric facility. There are uncertainties as to how the director would issue the warrant, how someone other than a law enforcement officer would execute the warrant, and the manner in which the subject person would be transported to the psychiatric facility. Furthermore, this section would require the Director of Health or psychiatric facility administrator to take reasonable steps, during detainment, to ensure the safety of the patient's dependents and to secure the patient's personal property and premises. There are no standards as to what constitutes "reasonable steps" and these proposed requirements could lead to legal liability.

The following recommendations are suggested to address the legal concerns raised in this section: (1) keep the existing wording under section 334-59, HRS; or (2) keep the existing wording under section 334-59, HRS with the following modifications: (a) change the section title to "Involuntary emergency examination and treatment"; (b) keep most of the wording in subsection (a), but change the beginning part from "An emergency admission may be initiated as follows: . . ." to "Emergency examination and treatment may be initiated as follows: . . ."; (c) keep the proposed changes to subsections (b) and (c); (d) keep the proposed changes to subsection (d), except paragraph (2); and (e) keep the proposed changes to subsection (e), except that release within forty-eight hours should be changed to one hundred twenty hours, to be consistent with the earlier proposed changes in section 1 of this bill.

Section 3 of the bill includes a formal judicial process where involuntary hospitalization is sought. There is a distinction between those persons already subject to involuntary treatment and those that are not. Problems arise with the interchangeable use of treatment and hospitalization, and whether involuntary treatment includes involuntary administration of

medication. Also, there are fiscal implications in allowing a person to apply for the services of a mental health expert at the expense of the Department of Health, without first making an appropriation to the department's budget.

The following recommendations are suggested to address the legal concerns raised in this section: (1) change the distinction to those between persons already subject to extended involuntary emergency treatment and persons not in extended involuntary emergency treatment, for consistency with the first two sections of the bill; (2) require the hearing on the petitions to be held not more than ten days after the filing of the petition, instead of five days and instead of as soon as practicable, to be consistent with the wording in section 334-60.5(b), HRS; and (3) in light of the amended procedures outlined above, the remainder of this section beginning with the third paragraph on page 18 should be deleted as unnecessary and to avoid confusion.

Section 4 of the bill includes two provisions, one where the hearing for involuntary hospitalization is open to the public, unless the subject or the subject's attorney requests it to be private, and the other where the record of the proceeding is obtainable only by request of the subject or subject's attorney, or by court order with good cause. Having a preference for the hearings to be open to the public seems to contravene the patient's constitutionally protected privacy rights and should therefore be deleted from this section. In addition, the provision pertaining to record access appears to make it more difficult for petitioners to obtain transcripts in the event of an appeal to a higher court. It is recommended that the records be obtainable upon request of the parties to the case.

Section 6 of the bill adds to section 334-71, HRS, a new subsection (b) stating that a patient's transfer between psychiatric facilities must be approved by a judge, after a hearing, if that transfer would constitute a greater restraint. The transfer would not be allowed unless the judge finds it to be necessary and appropriate. There is much ambiguity in this subsection, which raises some due process concerns. For example, it is unclear who determines whether a transfer constitutes a greater restraint. What are the procedural steps to getting that hearing before the judge? Who petitions the court for the hearing? It is recommended that this subsection be deleted altogether from the proposed changes.

We respectfully ask this Committee to incorporate these recommendations before passing this bill.

**Testimony of the Office of the Public Defender, State of Hawaii,  
to the House Committee on Judiciary**

February 14, 2012

**H.B. No. 2011 HD1: RELATING TO INVOLUNTARY PSYCHIATRIC  
HOSPITALIZATION**

Chair Keith-Agaran and Members of the Committee:

We oppose passage of H.B. No. 2011 HD1. This bill seeks to establish provisions in the Hawaii Revised Statute whereby a person can be detained on an emergency basis involuntarily in a hospital for up to 20 days following an informal hearing. This measure will raise constitutional issues because, in section 1 on page 2, it allows for a mental health worker, following an informal hearing to order a 20-day detention. The right to due process currently requires a judicial hearing to determine whether a person can be held involuntarily in a mental health institution.

The bill also provides for an informal hearing within 24 hours after a petition is filed. This expedited time period would not allow for enough time for an attorney appointed to represent the patient to prepare and thus render meaningful legal representation. The provision, on page 5, where a patient can petition a court for review of the informal ruling, would place the burden. A patient oftentimes lacks the resources or the level of mental functioning to explore such a petition and due process demands that the burden for justifying the detention at all times be placed on the state.

Also troubling is the provisions on page 9 which allows the director to issue warrants for the examination of a person upon the application of a physician or "other responsible person." Other responsible person could mean anyone and this provision is very much open to abuse. One could envision a hostile party in a domestic dispute attempting to order the hospitalization of an opposing party to gain leverage in a child custody battle. Currently, the judicial hearing prevents abuse of the involuntary commitment laws.

H.B. No. 2011 HD1 would replace the current provisions for emergency examination and hospitalization which allow only for a 48-hour period of hospitalization on an emergency basis. Any involuntary hospitalization beyond the 48-hour period requires a court order following a contested hearing in the family court. It would appear that the current system operates well in handling these situations. We do not feel an overhaul to the current statutes are necessary.

Thank for the opportunity to comment on this measure.



Committee: Committee on Judiciary  
Hearing Date/Time: Tuesday, February 14, 2012, 2:05 p.m.  
Place: Conference Room 325  
Re: Testimony of the ACLU of Hawaii in Opposition to H.B. 2011, HD1  
Relating to Involuntary Psychiatric Hospitalization

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 2011, HD1 relating to involuntary psychiatric hospitalization.

Involuntary commitment is a serious deprivation of liberty than can be justified only in the narrow circumstance where there is mental illness and an imminent physical danger to the person to be committed or to others, evidenced by observed behavior and where there is no less restrictive alternative. In such cases, strong procedural safeguards must be in place throughout to insure that the due process rights of the individual are protected.

H.B. 2011, HD1 seeks to eliminate judicial oversight and erode the standard such that individuals may be involuntarily committed in violation of their constitutional rights. For instance, H.B. 2011, HD1 would eliminate the protection afforded by a judicial hearing and permit an individual to be committed to extended involuntary emergency treatment against his or her will based solely on the determination of a mental health worker. The bill would also allow a physician to conduct an involuntary examination of an individual without a warrant and force that individual to receive "treatment" without his/her consent.

H.B. 2011, HD1 creates ambiguity in the standard, such that there is less justification required to involuntarily hospitalize and forcibly treat a person. For instance, it appears that a person may be involuntarily committed and forcibly treated for being "mentally ill" and "obviously ill," which may not justify stripping away that person's liberty.

Eliminating judicial oversight and allowing for ambiguity in the standards opens the door to abuse. This bill would allow the involuntary commitment and forced treatment of individuals who may not be a danger to themselves or others. The importance of judicial oversight and clear language and the full range of due process protections cannot be overstated, particularly when an individual is forced to take medication or receive other "treatment" against his/her will. For instance, an involuntarily committed individual must be allowed to refuse any treatment for mental illness, which requires informed consent including a full disclosure to the patient of the benefits and risks of treatment. If the attending physician deems that involuntary treatment is necessary, a due process hearing is required to determine if the patient is legally competent to

American Civil Liberties Union of Hawaii  
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Chair Keith-Agaran and Members of the Committee on Judiciary  
February 14, 2012  
Page 2 of 2

refuse standard medical treatment. An individual must be able to refuse neurosurgical treatment for mental disorder on any grounds whatsoever.

H.B. 2011, HD1 does not provide an individual with the opportunity to take advantage of less restrictive alternatives. A less drastic alternative cannot be deemed unavailable because the individual lacks funds for treatment. In fact, the state is obligated to finance treatment in non-coercive settings before it invokes involuntary commitment proceedings.

Finally, H.B. 2011, HD1 will also create conflicts of interest, in that without judicial oversight we cannot be assured of the impartiality of physicians certifying the need for involuntary commitment when some may gain financially from the admission of a new patient. In a circumstance where an individual's liberty is at stake, even the possibility of such a conflict of interest is unacceptable.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 45 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple  
Staff Attorney  
ACLU of Hawaii

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## Testimony in Support of HB2011HD1

**Committees on Judiciary**  
Tuesday, February 14, 2014 2:05 p.m.  
State Capitol, Conference Room 325

The National Alliance on Mental Illness, Hawaii State Chapter, supports this bill which allows new procedures for the examination and involuntary hospitalization of persons that meet the criteria for commitment to psychiatric facilities.

Every day NAMI receives telephone calls from family members of people who are gravely ill. These family members are desperate because they are unable to assist their loved one to receive treatment. Rather they must watch the mental health of someone they love or deeply care about deteriorate on a daily basis. Frequently the ill family member's condition leads them to become homeless and sometimes physical complications come into play.

A person with a mental illness is just that, a person with a brain disease. If a person receives treatment for a mental illness when it first manifests itself and continues to receive treatment at times that the disease recurs that person has a better long term prognosis. The longer or more frequently the disease goes untreated the more the likelihood that the persons prognosis will worsen.

Thank you for your consideration.

Kathleen Hasegawa  
Executive Director

Testimony for HB2011 on 2/14/2012 2:05:00 PM

**Testimony for HB2011 on 2/14/2012 2:05:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Sunday, February 12, 2012 11:55 AM

**To:** JUDtestimony

**Cc:** robertscottwall@yahoo.com

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Testimony for JUD 2/14/2012 2:05:00 PM HB2011

Conference room: 325

Testifier position: Oppose

Testifier will be present: Yes

Submitted by: Scott Wall

Organization: United Self Help

E-mail: robertscottwall@yahoo.com

Submitted on: 2/12/2012

**Comments:**

We are very much against this bill. If there is going to be an involuntary commitment bill this session then we would prefer SB2121 where, at least, the consumer is given a guardian ad litem.



Testimony for HB2011 on 2/14/2012 2:05:00 PM

**Testimony for HB2011 on 2/14/2012 2:05:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Monday, February 13, 2012 3:58 PM

**To:** JUDtestimony

**Cc:** kathi@namihawaii.org

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Testimony for JUD 2/14/2012 2:05:00 PM HB2011

Conference room: 325

Testifier position: Support

Testifier will be present: Yes

Submitted by: Kathleen Hasegawa

Organization: NAMI Hawaii

E-mail: kathi@namihawaii.org

Submitted on: 2/13/2012

Comments:



*... HELPING HAWAI'I LIVE LIFE WELL*

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PREVENTION DIRECTOR  
BRAD DeCAIRES, OFFICE  
MANAGER

February 13, 2012

TO: Gilbert S.C. Keith-Agaran , Chair, and Karl Rhoads , Vice Chair, and members  
of the Judiciary Committee

RE: HB2011hd1: Mental Health, Involuntary Commitment

Mental Health America of Hawai'i is in strong opposition to this bill. We do not  
believe that individuals should be more easily committed on an involuntary basis  
for longer periods of time with decreased due process protections.

In this bill, a new procedure would allow an individual to be detained for a period  
of up to twenty days (up from the present 48 hours); not only that, the hearing  
could be conducted by a "mental health worker" -- which is not defined --  
instead of a Judge. A mental health worker could include a psychiatric aide, for  
example. That is an egregious violation of civil rights, and opens up opportunities  
for persons to be detained without adequate court involvement.

We urge the Judiciary Committee to reject this bill.

Thank you for the opportunity to testify in opposition to this measure.

Sincerely yours,

Marya Grambs  
Executive Director

Testimony for HB2011 on 2/14/2012 2:05:00 PM

**Testimony for HB2011 on 2/14/2012 2:05:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Sunday, February 12, 2012 11:54 AM

**To:** JUDtestimony

**Cc:** robertscottwall@yahoo.com

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Testimony for JUD 2/14/2012 2:05:00 PM HB2011

Conference room: 325

Testifier position: Oppose

Testifier will be present: Yes

Submitted by: Scott Wall

Organization: Individual

E-mail: robertscottwall@yahoo.com

Submitted on: 2/12/2012

**Comments:**

Aloha,

I am very much against this bill. I would prefer it if the State moved ahead with SB2121 in which the patient would be guaranteed representation by a guardian ad litem. HB2011 is too broad and sweeping in my opinion.

WRITTEN ONLY

TESTIMONY BY KALBERT K. YOUNG  
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE  
STATE OF HAWAII  
TO THE HOUSE COMMITTEE ON JUDICIARY  
ON  
HOUSE BILL NO. 835, H.D. 1

February 14, 2012

PROPOSING AN AMENDMENT TO ARTICLE VII, SECTION 6, OF THE HAWAII  
CONSTITUTION, RELATING TO THE DISPOSITION OF EXCESS REVENUES

House Bill No. 835, H.D. 1, proposes a constitutional amendment to Article VII, Section 6, to authorize the Legislature to deposit excess general fund revenues into one or more funds to reduce unfunded liabilities for pension benefits and other post-employment benefits for State employees. The deposit of excess revenues would occur whenever general fund revenues in one fiscal year are projected to exceed general fund revenues in the previous fiscal year by 7% or more.

The department supports the intent of this bill to address the unfunded liabilities issue. It is a growing concern shared throughout the State that will undoubtedly require action. However, there is uncertainty about the impact of implementing the provisions of this bill.

For example, in FY 03, general fund revenues (tax and non-tax revenues) were 10.1% or \$347.9 million greater than FY 02 general fund revenues. Thus, the criteria for diverting excess revenues would have been met; however, if the excess revenues had been diverted to reduce unfunded liabilities, the fund balance at the end of FY 03 would have been reduced from \$117.2 million to -\$230.7 million.

This bill is planful in its approach to develop a means and measure that starts to address unfunded liabilities. We need to work together to understand the impact and implications on the financial plan - especially, in light of current and anticipated

financial conditions of the State. While the solution is not likely to be positive all-around, we recognize that the bill is strategic in implementing a financial structure to deal with these long standing problems.

We look forward to working with the Legislature on these important matters and would welcome the opportunity to further explore the potential for solutions.